

The Board has considered the record and adopted the stipulations listed in the Award. Although claimant listed average weekly wage as an issue, at oral argument the parties agree that issue is not in dispute and the stipulations set forth in the Award are appropriate.

ISSUES

The ALJ awarded claimant a 4 percent impairment to her right upper extremity.¹ The ALJ did not find sufficient evidence to conclude that the claimant sustained permanent impairment to her left upper extremity at the wrist level as a result of working for respondent. Accordingly, claimant's recovery was limited to the 4 percent scheduled functional impairment.

The claimant requests review of the nature and extent of disability awarded by the ALJ. Claimant is asking for a finding of a 78.5 percent work disability based upon a 50 percent task loss identified by Dr. Edward J. Prostic and a 100 percent wage loss.²

Respondent argues that claimant is only entitled to the 4 percent impairment to the right upper extremity and the ALJ's Award should be affirmed in all respects. Alternatively, in the event that the Board finds claimant sustained impairment to the body as a whole, respondent argues claimant is nevertheless prohibited from receiving an award for work disability. Respondent contends claimant's termination from her job was due to attendance issues and wholly unrelated to her work injuries. Thus, she failed to exhibit good faith in retaining employment which paid her a comparable wage. Accordingly, respondent argues that claimant's recovery should be limited to her functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a machine tenderer. This job required claimant to repetitively use her hands and arms in a forceful manner. Beginning March 2001, claimant began to experience problems in her right shoulder and left wrist.³ During this time, claimant was repetitively carrying 5 gallon buckets of ink and was constantly having to grip and pull with both her upper extremities.⁴ These complaints of pain continued up to April 11, 2001, the date she was provided with treatment.

¹ The Award grants permanency to the left upper extremity but the parties agree that this is a typographical error and should have been *right* upper extremity.

² These are figures cited in claimant's brief to the ALJ dated September 25, 2003. Claimant's counsel concedes claimant is working for another employer albeit for a lower wage rate.

³ R.H. Trans. at 11.

⁴ *Id.* at 11-12.

Claimant was first referred to an occupational health facility. The physician who initially saw her recommended a splint for her left hand and prescribed anti-inflammatories. Dr. Dennis A. Estep began treating claimant in April 2001, and according to him, claimant's initial complaints were tingling in her 4th and 5th digits of her right hand. Upon examination, claimant complained of tenderness in both elbows.⁵ Dr. Estep eventually diagnosed resolved right rotator cuff tendinitis and resolving right shoulder impingement along with right medial epicondylitis and right wrist tendinitis.⁶ After recommending a Functional Capacity Evaluation, he assigned a 7 percent permanent impairment to the right upper extremity and claimant was released from his care as of August 27, 2001. Dr. Estep specifically testified claimant had no permanent impairment in her left upper extremity.⁷

Dr. Estep was asked to comment on claimant's task loss given her right upper extremity limitations. He concluded claimant should not reach past 21 inches from her body. As a result, based upon the task list formulated by Monte Longacre, claimant has lost the ability to perform 11 of 35 tasks, all due to the limitations created by her right upper extremity impairment.⁸

While undergoing treatment with Dr. Estep, claimant was prescribed pain medications which, she said made her feel drowsy. On several occasions claimant took these pills, overslept and missed work. As a result, she began to accrue points. According to respondent's policy, an employee is permitted to accrue 7 points over a certain period of time. At that point the employee is subject to termination or time without pay. Claimant was verbally warned about her absences on April 30, 2001, and again on June 6, 2001. On September 11, 2001 claimant was given a written warning, however she denies any recollection of this warning. On September 25, 2001, claimant was again late due to oversleeping. By October 2001, she had 4 more instances that resulted in points and on October 24, 2001, claimant's employment was terminated.

Following her termination, a preliminary hearing was held on the issue of further medical treatment and temporary total disability benefits. As a result, a preliminary hearing order was entered granting claimant temporary total disability benefits and pursuant to the ALJ's Order, claimant began treatment with Dr. William O. Reed, who ultimately performed an arthroscopic subcromial decompression and excision of the lateral clavicle on her right shoulder on April 30, 2002. Following surgery to the right shoulder and given claimant's complaints to her left little and ring finger, Dr. Reed sought and received permission to investigate claimant's left upper extremity complaints. He examined her left upper

⁵ Estep Depo. at 6.

⁶ *Id.* at 8.

⁷ *Id.* at 8-9.

⁸ *Id.* at 17.

extremity on June 10, 2003 and noted the complaints of ring and small finger numbness and ordered an EMG along with physical therapy. The test proved negative without evidence of any cervical radiculopathy or focal nerve entrapment. Consequently, Dr. Reed concluded surgery was not necessary. He imposed restrictions of minimal lifting over the shoulder, no work above the shoulder, no reaching to the side or in front of more than 12-24 inches and no lifting, pushing or pulling over 15 pounds. Dr. Reed assigned 2 percent impairment to the left upper extremity, based solely upon claimant's subjective complaints, and a 5 percent impairment to the right upper extremity for her work-related injuries.

Claimant was also seen by Dr. Edward J. Prostic, an orthopaedic physician, at the request of her counsel. Dr. Prostic first saw claimant in August 2002, after claimant had undergone surgery to her right shoulder. Dr. Prostic assigned 20 percent partial impairment to the right upper extremity at the level of the shoulder. There is no mention of any complaints to claimant's left upper extremity in this first report.

Claimant again saw Dr. Prostic on October 18, 2002. During this visit claimant complained of left upper extremity instability. Dr. Prostic diagnosed a trapped median and ulnar nerve on the left and assigned a 12 percent impairment to the left upper extremity.⁹ When both of Dr. Prostic's ratings are combined, it yields an 18 percent permanent impairment to the body as a whole.

Dr. Prostic also testified that claimant has lost the ability to perform 16 of 28 tasks identified by Dan Zumalt, the vocational specialist who summarized claimant's job history and task performance over the last 15 years.

Since her termination, claimant has sought employment from most of the employer's in her area that were offering employment at \$10 per hour or more. When claimant sought employment with Freeman Hospital, she was obligated to undergo a pre-employment physical. This physical took place on November 6, 2002 and was performed in Dr. Estep's office by one of his associates. Dr. Estep testified that no restrictions were imposed upon claimant as a result of the examination. Claimant was successfully employed and continues in her position as a housekeeper with the hospital earning \$8.25 per hour for 40 hours per week plus dental benefits. Nevertheless, claimant testified that she continues to look for higher paying employment even though she is currently employed.¹⁰

After hearing the claimant's testimony and reviewing the medical evidence, the ALJ awarded claimant a 4 percent functional impairment to her right shoulder only.¹¹ He specifically indicated there was insufficient evidence to persuade him that claimant

⁹ Prostic Depo. at 14.

¹⁰ R.H. Trans. at 20.

¹¹ Again, the Award references the left shoulder, but both parties agree it should be the right.

sustained a permanent impairment to her left wrist. The Board agrees. Claimant may have vocalized complaints about her left upper extremity but it is clear that those complaints were not consistent. Even when she was evaluated by Dr. Prostic, the physician she sought out for an opinion as to her permanency in connection with this claim, she voiced no complaints as to her left upper extremity until the second visit. This second visit was scheduled when the first report neglected to make any reference to the left wrist or elbow. Dr. Reed's impairment rating of 2 percent was based solely on claimant's subjective complaints and without any objective test results to corroborate her complaints. Both Dr. Estep and Dr. Reed's records do not reflect consistent left extremity complaints. Given the subjective nature of claimant's complaints, credibility most certainly played a part in the ALJ's decision. The Board often defers to an ALJ's judgment in these decisions. The Board affirms the ALJ's assessment of claimant's permanency and the limitation of her functional impairment to 4 percent to the right shoulder.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated January 12, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director